TANG TIEW YONG & ORS

v.

WONG JONG HOON & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-9-2001]
28 MARCH 2002

DAMAGES: *Quantum - Loss of future earnings - Award of - Failure of trial judge to consider s. 28A(2)(c)(iii) of the Civil Law Act 1956 - Whether trial judge had erred in law - Civil Law Act 1956, s. 28A(2)(c)(iii)*

DAMAGES: *Quantum - Multiplier - Whether there was a distinction between pre-trial and post-trial loss of earnings - Whether computation of future earnings should commence from date of injury - Failure of trial judge to consider s. 28A(2)(d)(ii) of the Civil Law Act 1956 - Whether trial judge had erred in law - Civil Law Act 1956, s. 28A(2)(d)(ii)*

CIVIL LAW ACT: *Damages - Personal injuries - Quantum - Loss of future earnings - Multiplier - Failure of trial judge to consider s. 28A(2)(c)(iii) and (d)(ii) of the Civil Law Act 1956 - Whether trial judge had erred in law - Civil Law Act 1956, s. 28A(2)(c)(iii), (d)(ii)*

This was the appellants' appeal against the decision of the learned sessions court judge in respect of a claim by the second respondent for personal injuries and damages suffered as a result of a road accident. This appeal was not against the learned sessions court judge's finding on liability but only against the awards made for pre-trial earnings and EPF contributions. The appellants contended that the learned sessions court judge had erred in law and in fact when she failed to consider s. 28A(2)(c)(iii) and (d)(ii) of the Civil Law Act 1956 ('the Act'), which set out certain matters that a court must take into account when awarding damages for loss of future earnings, and the formula for calculating the multiplier or number of years' purchase when assessing loss of future earnings of a person between the ages of 31 to 54 at the time when he was injured, respectively.

Held:

[1] The learned sessions court judge had erred in law when she made the award for loss of future earnings without addressing her mind at all to s. 28A(2)(c)(iii) of the Act. Had she done so, she would have found that the second respondent had admitted to incurring monthly expenses of

RM200 for his food and RM30 for petrol charges, which the learned sessions court judge should have deducted from the second respondent's monthly salary of RM1,200, thus giving him a loss of earnings of RM970 per month. (p 461 d-f)

[2] After the introduction of s. 28A(2) into the Civil Law Act 1956, there was no distinction between pre-trial loss and post-trial loss of future earnings as the computation of loss of future earnings should commence from the date of injury. Furthermore, as the second respondent was 54 years old when he was injured, the learned sessions court judge should have assessed damages for loss of future earnings and loss of EPF contributions in accordance with the statutory formula in s. 28A(2)(d)(ii) of the Act which would have given a multiplier of six months and not 20 months. (pp 462 h, 463 a, h & 464 a-c)

[Appeal allowed. Awards substituted with new awards of RM5,820 for loss of future earnings and RM864 for loss of EPF contributions.]

Case(s) referred to:

Chang Chong Foo & Anor v. Shivanathan [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 ***(foll)***

Chu Kim Sing & Anor v. Abdul Razak Amin [1999] 4 CLJ 448 ***(not foll)***

Dirkje Peiternella Halma v. Mohd Noor Baharom & Ors [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99 ***(foll)***

Lee Tai Kau & Anor v. Rajanderan Manickam & Anor [1996] 1 CLJ 589 ***(not foll)***

Murtadza Mohamad Hassan v. Chong Swee Pian [1980] 1 MLJ 216 ***(not foll)***

N Vijaya Kumar Narayanasamy v. Voon Chen Lim [1989] 3 MLJ 255 ***(not foll)***

Nagarajan Veerappan v. Ananthan Parama Sivam & Anor [1989] 2 CLJ 1243; [1989] 2 CLJ (Rep) 153 ***(foll)***

Tan Hairuddin & Anor v. Bayeh Belalat [1990] 2 CLJ 775; [1990] 1 CLJ (Rep) 529 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 28A(2)(c)(iii), (d)(ii)

For the appellants - Frank Tang; M/s Tang & Partners
For the respondents - Robert Lau; M/s Stephen Robert & Wong

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:

This is an appeal against the decision of the learned Sessions Court judge given on 16 May 2001 in respect of a claim for personal injuries and damages suffered as a result of a road accident. The brief facts of the case are these.

On 23 July 1998 the second respondent (who was the second plaintiff in the court below) was riding a motor-cycle (belonging to the first respondent) along Jalan Upper Lanang heading in the direction of Sibu town when a collision occurred between the second respondent's motor-cycle and a lorry driven by the third appellant (and owned by the first and second appellants), in front of a construction site known as Romany Development.

As a result of the accident the second respondent, who was then 54 years of age and working as a store-keeper earning RM1,200 per month, suffered personal injuries and was hospitalised immediately after the accident. Even after his discharge on 26 July 1998, the second respondent was unable to work until the date of trial.

After a full trial, the learned Sessions Court judge found that the accident had been solely caused by the negligence of the third appellant and accordingly entered judgment against the appellants. Damages were then assessed and awarded to the second respondent under several heads of claim, not all of which are relevant to this appeal. Thus, the learned Sessions Court judge made awards in respect of:

(a) medical expenses which she assessed at RM9,394.12 but awarded a sum of RM6,262.74 being two-thirds of the sum assessed;

(b) loss of pre-trial earnings which she assessed at RM24,000 being RM1,200 x 20 months;

(c) loss of EPF contributions at RM2,880 being the employer's contribution of 12% of the second respondent's income of RM1,200 per month over 20 months;

(d) general damages for pain and suffering and loss of amenities at RM36,000.

The appellants being dissatisfied with the awards made under the above four heads of claim have brought this appeal. They do not appeal against the learned Sessions Court judge's finding on liability.

At the hearing of this appeal, the appellants did not pursue their appeal against the awards made for medical expenses and general damages for pain and suffering. This judgment therefore relates to the appellants' appeal against the awards made for loss of pre-trial earnings and EPF contributions only. I now consider each of these in turn.

Loss Of Pre-trial Earnings

It is the case of the appellants that the learned Sessions Court judge had erred in law and in fact when she failed to consider s. 28A(2)(c)(iii) and

s. 28(2)(d)(ii) of the Civil Law Act 1956 in awarding RM24,000 to the second respondent for loss of pre-trial earnings.

To appreciate the appellants' complaint, it is necessary to recapitulate certain undisputed facts. When the accident occurred on 23 July 1998, the second respondent was 54 years old and employed as a store-keeper earning a monthly salary of RM1,200. By the time the case came on for trial, 29 months had passed by. In making her award the learned Sessions Court judge allowed loss of pre-trial earnings over 20 months (having knocked-off nine months) as she held that the second respondent could have secured a job after 20 months had he attempted to do so. Thus, the learned Sessions Court judge awarded loss of pre-trial earnings as follows: RM1,200 x 20 months = RM24,000.

It is the contention of the appellants that in doing so, the learned Sessions Court judge had failed to consider s. 28A(2)(c)(iii) and s. 28A(2)(d)(ii) of the Civil Law Act 1956 which subsections not only set out certain matters which a court must take into account when awarding damages for loss of future earnings; but also the formula for calculating the number of years' purchase when assessing loss of future earnings of a person between the ages of 31 to 54 at the time when he was injured.

For convenience, I set out the above subsections:

> 28A. Damages in respect of personal injury
>
> (2) In assessing damages under this section:
>
> (a) ...
>
> (b) ...
>
> (c) in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;
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> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

(d) in assessing damages for loss of future earnings the Court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

It will be seen that by sub-s. 2(c)(iii) of s. 28A, the court must, when awarding damages for loss of future earnings, take into account the amount by which the earnings of a plaintiff is diminished by his living expenses which he either admits to or it is proved that he incurred.

It is the complaint of the appellants that the learned Sessions Court judge had not made any deductions for his living expenses from the second respondent's monthly earnings of RM1,200 even though he had admitted during his cross-examination that he incurred some RM400 to RM500 for his own expenses each month. According to the appellants, the second respondent admitted that he spent RM30 per month on petrol, RM200 per month on food and cigarettes and RM200 per month on car instalments; thus making a total of RM430 per month which he incurred for living expenses which should have been deducted from his monthly earnings.

The second respondent's answer to the appellants' complaint is that living expenses should not be deducted from any award for loss of future earnings as it would be absurd to do so. Counsel for the second respondent argued that as the second respondent is still living and must, therefore, incur living expenses in order to live, any deduction would amount to a double deduction which should not be allowed.

I regret that the law as well as case authority is against the second respondent on this point.

The point was taken and decided by the then Supreme Court in *Chang Chong Foo & Anor v. Shivanathan* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27, a decision which is binding on this court. That case also arose out of a road

accident between a motor-cycle driven by the plaintiff/respondent and a car driven by the defendant/appellant. The learned trial judge found the defendant/appellant 100% to blame for the accident. When giving his evidence, the plaintiff/respondent said that he went to work by motorcycle and spent RM60 per month on petrol and he also took his meals at work which cost him RM5 per day. In awarding the plaintiff/respondent damages for loss of future earnings, the learned trial judge made an award without making any deductions for the above two items under s. 28A(2)(c)(iii) of the Act. On appeal against that part of the decision, it was argued for the defendant/appellant that the sum of RM60 per month (for petrol) and RM5 per day (for meals) being living expenses coming within the meaning of s. 28A(2)(c)(iii) should have been deducted from his monthly earnings, while the plaintiff/respondent contended that living expenses can only be deducted if a person is dead; because if he is alive, he needs living expenses in order to live. The contention of the plaintiff/respondent was rejected by the Supreme Court which held that s. 28A is clearly intended for a living plaintiff and that living expenses, if proved or admitted, must be deducted when an award is made for loss of future earnings. This is what Harun Hashim SCJ said in delivering the decision of the court:

> The plaintiff did give evidence and he said that:
>
> (a) He went to work by motor cycle and spent $60 pm on petrol.
>
> (b) His meals at work cost him $5 pd.
>
> Mr. Nathan (for appellant) says both these items are living expenses under (iii). Mr. Gunasegaran says living expenses can only be deducted if a person is dead, if alive he needs living expenses in order to live. We cannot accept Mr. Gunasegaran's argument, because s. 28A is clearly intended for a living plaintiff and therefore s. 28A(2)(c)(iii) applies to the facts of this case.
>
> What then is meant by living expenses in (iii)? It is trite law that words in a statute must be given their ordinary meaning. The *Shorter Oxford English Dictionary* defines 'living' as: 'The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance.' 'Expenses' means 'Money out of pocket'.
>
> In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: see *Amar Singh v. Chin Kiew*. This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s. 7(3)(iv)(c) which came into force on 1 October 1984 and states:

> In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.
>
> It will be seen that the same language is used in both s. 7(3)(iv)(c) and s. 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s. 7 and s. 28A bear the same meaning.

Applying what was stated by the Supreme Court in *Chang Choo Foo* to the facts of our case, it is my view that the learned Sessions Court judge had erred in law when she made the award for loss of future earnings without addressing her mind at all to the provisions of s. 28A(2)(c)(iii) of the Act. Had she done so, she would have found that the second respondent had admitted to incurring monthly expenses of RM200 for his food and RM30 for petrol charges. Contrary to the submissions of counsel for the appellants, the second respondent did not admit to paying monthly instalments of RM200 for a car. His evidence was that the car was owned by his son and he helped to pay the instalments when his son could not do so. There was no evidence or admission that he did so monthly. In the result, the learned Sessions Court judge should have deducted RM230 (being RM200 for food and RM30 for petrol) from the monthly salary of RM1,200 earned by the second respondent, thus giving him a loss of earnings of RM970 per month.

Having determined what the loss in earnings suffered by the second respondent in each month amounted to, the next question that must be determined is, what is the multiplier or number of years' purchase when assessing the damages for loss of future earnings to the second respondent who was 54 years old when he met with the accident on 23 July 1998?

It will be recalled that the learned Sessions Court judge awarded the second respondent "pre-trial loss of earnings" over 20 months. It is the complaint of the appellants that the learned Sessions Court judge had erred in law when she did so as she failed to direct her mind to the provisions of s. 28A(2)(d)(ii) of the Act which sets out the formula for calculating the number of years' purchase (or multiplier) where a person is between 31 and 54 years of age at the time when he is injured. It is the contention of the appellants that if the formula stated in s. 28A(2)(d)(ii) is followed, then the number of years' purchase or the multiplier would only be six months ie, (55-54) divided by

two = 1/2 or six months, and not 20 months as awarded by the learned Sessions Court judge. It is also the contention of the appellants that since 1 October 1984, when the Civil Law Act 1956 was amended and s. 28A(2) introduced into the Act, there is no longer any distinction between pre-trial and post-trial loss of earnings and that loss of future earnings runs from the date of the injury.

Counsel for the second respondent took an opposite view. He submitted that the learned Sessions Court judge was correct in awarding the second respondent pre-trial loss of earnings of 20 months as s. 28A(2)(c)(d) of the Act only applies to loss of future earnings ie, to post-trial loss of earnings and not pre-trial loss of earnings as the latter does not form part of loss of future earnings since it has been looked upon as special damages. Counsel for the second respondent also said that it is the practice of the courts to deduct the number of years of pre trial loss of earnings from the multiplier under s. 28A(2)(d).

In my view, the point under discussion has been decided in *Dirkje Peiternella Halma v. Mohd Noor Baharom & Ors* [1990] 2 CLJ 167; ([1990] 1 CLJ (Rep) 99). In that case this is what Gunn Chit Tuan SCJ had to say about the matter in delivering the judgment of the Supreme Court at p. 168 (p. 101):

> During the hearing before us Mr. Gurbachan Singh, leading counsel for the appellant, agreed with us that since the amendment of the Civil Law Act 1984 on 1 October 1984 there is no distinction between pre-trial and post-trial loss of earnings. He agreed that as from that date loss of future earnings should be awarded in relation to the time when the plaintiff was injured, that is, the date of accident or injury and a proper award for loss of future earnings made under s. 28A(2)(c) of the Civil Law Act 1956.

In *Tan Hairuddin & Anor v. Bayeh Belalat* [1990] 2 CLJ 775; [1990] 1 CLJ (Rep) 529 Haji Abdul Malek J (as he then was) followed the decision in *Dirkje*'s case and set aside an award for pre-trial loss of future earnings made by the Sessions Court judge to a plaintiff who was 59 years old on the date of accident, on the grounds that the computation of loss of future earnings should commence from the date of injury.

While I agree that prior to the introduction of s. 28A(2) into the Civil Law Act 1956 on 1 October 1984, the court had a discretion to, and, indeed did, award pre-trial loss of earnings as special damages (see *Murtadza Mohamad Hassan v. Chong Swee Pian* [1980] 1 MLJ 216) calculated from the date of accident to the date of trial, the position changed after 1 October 1984 because, as Gunn Chit Tuan SCJ put in *Dirkje*'s case, there is no distinction between pre-trial and post-trial loss of earnings as loss of future earnings should be

awarded in relation to the time when the plaintiff was injured; or put another way, computation of loss of future earnings should commence from the date of injury.

In this regard, I would also refer to *Nagarajan Veerappan v. Ananthan Parama Sivam & Anor* [1989] 2 CLJ 1243; ([1989] 2 CLJ (Rep) 153) where KC Vohrah J (as he then was) took the view that after 1 October 1984, pre-trial loss of earnings no longer forms a head of claim. This is what the learned judge said:

> Pre-trial loss of earnings for claims arising under the pre-amendment law were and may be claimed as special damages (see *Murtadza v. Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 215) calculated from the date of accident to the date of trial.
>
> The provisions of Section 28A(2), made in 1984, make no mention of this head of damages; and all relevant provisions for the purpose of calculating loss of future earnings refer to the age at the date of accident and not to the age at the date of trial as the figure. It seems to me therefore that there can be no separate head for pre-trial loss.

In a latter part of his judgment, when dealing with the question of whether the 'years' purchase' or multiplier under s. 28A(2)(d)(ii) should be applied directly to the multiplicand or be applied indirectly to it through an annuity table, KC Vohrah J said (at p. 1249 (p. 159)):

> In fact in not allowing for pre-trial loss to be claimed as an item of special damages (as was explained earlier in the judgment) the damages allowable in respect of preamendment claims become subsumed in the damages that become due on the statutory formula leaving the defendant less damages than he would have got for pre-amendment claims.

I respectfully concur with what was said by his Lordship.

Counsel for the second respondent referred me to three cases in which the High Court has awarded pre-trial loss of future earnings. They were *N Vijaya Kumar Narayanasamy v. Voon Chen Lim* [1989] 3 MLJ 255; *Chu Kim Sing & Anor v. Abdul Razak Amin* [1999] 4 CLJ 448 and *Lee Tai Kau & Anor v. Rajanderan Manickam & Anor* [1996] 1 CLJ 589. In view of the clear pronouncement in *Dirkje*'s case about there no longer being any distinction between pre-trial and post-trial loss of future earnings and from what date loss of future earnings are computed, I respectfully decline to follow those cases.

Even if I am wrong in what I say about pre-trial loss of future earnings after 1 October 1984, as the second respondent was 54 years old at the time when he was injured the learned Sessions Court judge should have assessed damages

for loss of future earnings in accordance with the statutory formula in s. 28A(2)(d)(ii) which would have given a multiplier of six months and not 20 months. Thus, the amount payable to the second respondent would be: RM970 x 6 = RM5,820.

Re: Loss Of EPF Contributions

It follows from what I have said above that the learned Sessions Court judge should have awarded loss of EPF contributions using a multiplier of six months instead of 20 months.

In the result, I allow the appeal against the award under the above two heads of damages and set aside the awards made by the learned Sessions Court judge. In their place, I award a sum of RM5,820 for loss of future earnings and RM864 for loss of EPF contributions ie, RM1,200 x 12% x 6 = RM864.